BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBY D. MOORE,	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,900
AMARR COMPANY	)	
Respondent	)	
AND	)	
	)	
CNA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from the November 6, 2001, preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery.

Issues

Claimant's right foot was injured September 14, 1999 while working for respondent. This is not disputed. What is disputed is whether as a result of a limp caused by that foot injury claimant thereafter suffered an aggravation of his preexisting low back condition. Judge Avery apparently found claimant's current back condition and need for medical treatment to be a natural progression of the compensable foot injury, because Judge Avery awarded claimant preliminary hearing benefits for the back. Respondent and its insurance carrier (respondent) contend that claimant's current condition and need for medical treatment is not the result of the September 14, 1999, accident at work but instead is the direct result of claimant's preexisting condition and/or a subsequent accident and intervening injury and did not occur at work. Therefore, the issue is whether claimant's current temporary total disability and need for medical treatment are due to an accidental injury that arose out of and in the course of claimant's employment with respondent. This issue is considered jurisdictional and is subject to review by the Appeals Board (Board) on an appeal from a preliminary hearing order.[1]

[1] K.S.A. 44-534a(a)(2) and K.S.A. 44-551(b)(1).

Findings of Fact and Conclusions of Law

On September 14, 1999 claimant injured his foot when, in the course of performing his regular job duties for respondent, a coworker drove over claimant's foot with a loaded cart. Claimant has treated with orthopedic surgeon William A. Bailey, M.D. for his foot and subsequent low back problems. Dr. Bailey was also claimant's treating physician for his previous low back condition. His treatment for that preexisting low back condition included surgery on April 4, 1999. Dr. Bailey relates claimant's current low back problem to the September 14, 1999 foot injury.

> The present disk problem that Mr. Moore is suffering from does not involve his old herniation, but it is at a different level. He really had not been working during that interval and the only risk factor that I can uncover in this patient is that he did have an abnormal gait pattern during this time due to his foot injury. This most likely contributed to the herniation of this disk.[2]

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[5]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[6] An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates,

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[2] Tr. of Prel. H., Respondent's Ex. F (Oct. 26, 2001).

[3] K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[4] K.S.A. 44-508(g). *See also In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 44-501(g).

[6] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

[7] Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

accelerates or intensifies the condition.[8] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[9]

Acknowledging this case is a close call, the Board finds the low back compensable. There has clearly been a worsening of claimant's preexisting back condition and there is no evidence claimant has suffered an intervening accident. Claimant's testimony that after the foot injury he developed a limp and that walking with the limp aggravated his low back condition is credible and is supported by the opinion of his treating physician. Although there is evidence to the contrary, most notably the opinion of Dr. David K. Ebelke, based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports the claimant's contentions. Accordingly, the Board finds the current low back condition is compensable as a direct and natural consequence of the September 14, 1999 work related injury. Therefore, the ALJ's decision to award preliminary benefits should be affirmed. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[10]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge, Brad E. Avery on November 6, 2001, should be, and the same is hereby, affirmed.

Dated this_____ day of February 2002.

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BOARD MEMBER

c: Timothy G. Lutz, Attorney for Respondent
William G. Manson, Attorney for Claimant
James Kiley, Attorney for Claimant
Philip S. Harness, Director
Brad E. Avery, Administrative Law Judge

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[8] Boutwell v. Domino's Pizza, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998); Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[9] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P2d 1263, *rev. denied* 261 Kan. 1084 (1996).

[10] K.S.A. 44-534a(a)(2).